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Unspeakable Suspicions: Challenging the Racist Consensual Encounter

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NSPEAKABLE SUSPICIONS

THE RACIST CONSENSUAL ENCOUNTER

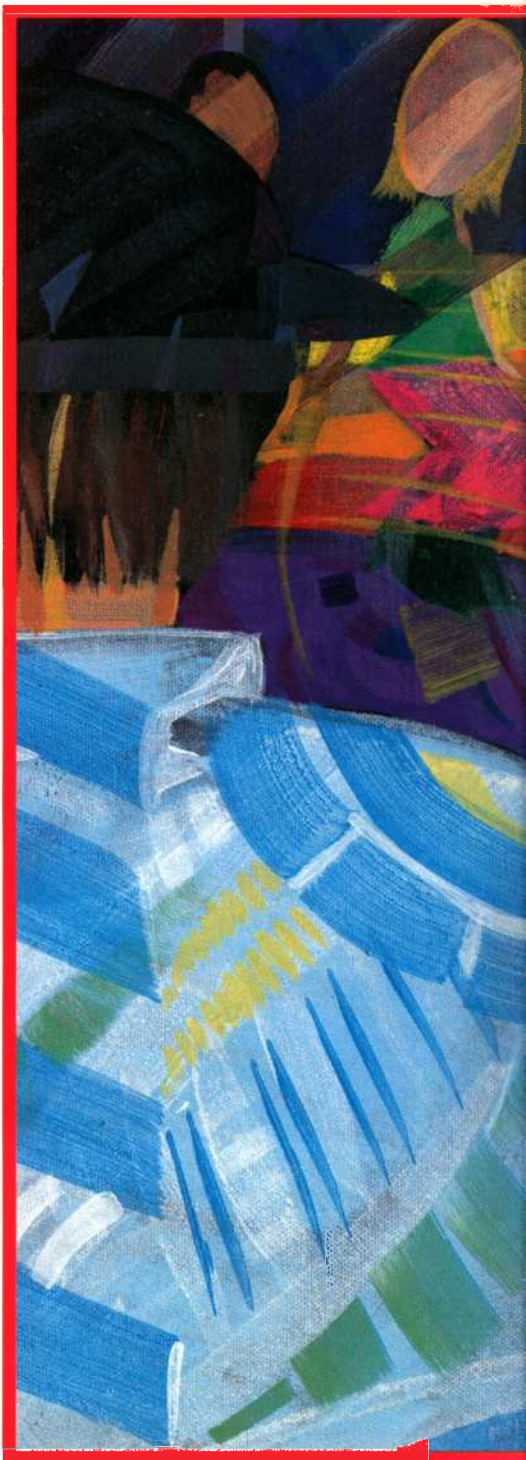
By Peter Schoenburg and Risa Evans

In recent years, law enforcement officials have honed a new technique for fighting the "War on Drugs:" the suspicionless police sweep of stations and vehicles involved in interstate mass transportation. Single officers or groups of officers approach unfortunate individuals in busses, trains, stations and airline terminals. A targeted traveller is requested to show identification and tickets, explain the purpose of his or her travels, and finally, at times, to consent to a luggage search. As long as "a reasonable person would understand that he or she could refuse to cooperate,"¹ the encounter between the law-enforcement official and the traveller is deemed "consensual," not subject to the constraints of the Fourth Amendment.²

In theory, "consensual" encounters are both non-intrusive and randomly applied. In practice, of course, they are neither. These invasions of travellers' privacy can be burdensome and intimidating. As Jus-

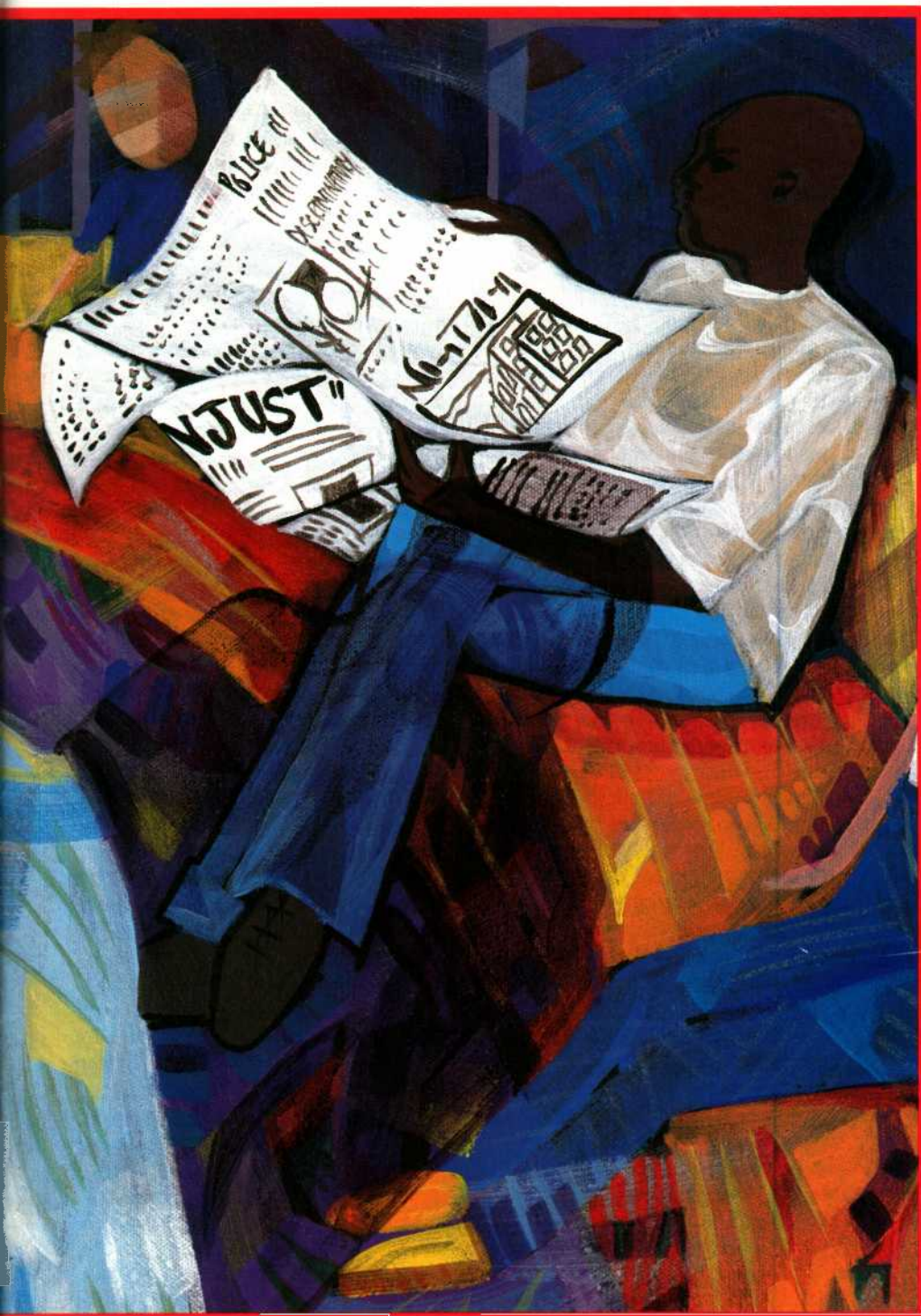
tice Marshall noted in his dissent to *Florida v. Bostick*, officers displaying badges, weapons and other indicia of authority accost travellers without advising them that they are free not to speak to the officers.³ On many occasions, the encounters occur in the cramped confines of a bus during temporary intermediate stops, with officers towering between the passenger selected for the interview and the bus's exit.⁴ By inconveniencing and intimidating individuals who use public transportation, "consensual" encounters burden the constitutionally protected right to interstate travel.⁵

The Supreme Court's ready acceptance of the burden created by consensual encounters marks a troubling societal shift away from the promise of individual liberty. Equally troubling, however, is the burden's uneven distribution, which marks an abandonment of equal protection principles. In theory, the bur-



den created by "consensual" encounters is borne equally by all members of the society that supposedly benefits from these encounters, because law enforcement officers initiate them randomly and without articulable suspicion.

However, as Justice Marshall notes, "the basis of the decision to single out particular passengers during a suspicionless sweep is less likely to be inarticulable than unspeakable." In practice, race often influences or determines an officer's decision to approach a traveller for an interview. The "War on Drugs" means not only an infringement on their



liberty to come and go at will, but also a denial of equal protection.

As the Los Angeles riots so poignantly demonstrated, the harm from racially discriminatory encounters between police officers and individual citizens extends to the entire community. In the wake of the riots, a nationwide poll showed that 84 percent of blacks believe they do not receive fair or equal treatment in the courts. The public's justified perception that the criminal justice system discriminates against blacks and other minorities erodes both confidence in the system and willingness to rely on it.

The question of whether race or nationality can be a factor in a law enforcement officer's decision to detain an individual has, up until now, been raised most often at suppression hearings, where defendants who were stopped for investigation based partially on their race or racial appearance argue that they were detained without reasonable, articulable suspicion. Unfortunately, this approach has not been particularly helpful. While lower court cases have not allowed race to be the sole basis for an investigative stop, they have often allowed it to tip the scales of reasonable suspicion.¹⁰

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In the leading case on this question, *United States v. Brignoni-Ponce*,¹¹ the Supreme Court held that the apparent Mexican descent of riders in a vehicle near the U.S.-Mexican border did not, by itself, provide reasonable suspicion for a roving border patrol to subject the vehicle to a *Terry* stop. The Court did, however, allow the appearance of Mexican ancestry to be a factor providing reasonable suspicion in border area stops if other factors are present as well. Notably, although a substantial portion of the defendant's brief was devoted to arguing that stops based on race violated the equal protection component of the Fifth Amendment, the Court never addressed the issue.

Unlike investigative stops, there are no Fourth Amendment limits on "consensual" encounters. An officer can target anyone, whenever and for whatever reason he chooses. The absence of an informant's tip or other information to guide an officer's discretion invites the officer to base his targeting decisions — consciously or not — on stereotypes.¹² The Fourth Amendment offers no protection to defendants who have been selected for "consensual" encounters based partially or even solely on the basis of invidious racial stereotypes. Happily, however, the story does not end here.

The Solution: Equal Protection Limits On Executive Discretion

The absence of formal limits on law enforcement officers' discretion over whom to target for "consensual" encounters is typical of executive branch decision-making. The Supreme Court has acknowledged the evils associated with "standardless and unconstrained discretion."¹³ Thus, as the Court has consistently recognized, executive and administrative discretion is limited by the equal protection and due process clauses of the Constitution.

Law enforcement officers may not enforce laws in a racially discriminatory manner.¹⁴

Prosecutors may not consider race while exercising their virtually unlimited discretion to peremptorily strike jurors.¹⁵ Prosecutors may not consider race when exercising their similarly unfettered discretion in deciding whom to prosecute,¹⁶ or whether to file a "substantial assistance" motion.¹⁷ Nor may they consider race in deciding whether to move a defendant from state to federal court.¹⁸ Decisions to approach certain individuals for "consensual" encounters should be similarly subject to the equal protection requirement that they not be based on race.

Apparently, no lower court has directly ruled on whether equal protection principles prohibit race from playing a role in "consensual" encounters. On at least three occasions, federal courts have approved convictions growing from consensual encounters in which a defendant was targeted in part because of his race. However, even as the courts managed for various reasons to avoid doing justice in the individual cases before them, they indicated in dicta that race-based interview decisions are constitutionally suspect. Additionally, dissents in both cases articulate clear visions of the equal protection limits on "consensual" encounters. Along with *Brignoni-Ponce* and Supreme Court opinions about the equal protection limits on executive discretion, these cases provide a framework for challenging racially-motivated "consensual" encounters.

In *United States v. Taylor*,¹⁹ defendant Taylor, who was "poorly attired,"²⁰ was the only black to emerge in the initial group of passengers exiting from a plane that arrived in Memphis from Miami. The Sixth Circuit decided that because the encounter that led to his arrest and conviction on cocaine charges was "consensual," it did not need to consider whether Taylor was stopped because of his race, or whether the incorporation of a racial component into the Drug Enforcement Administration's (DEA's) drug courier profile would violate equal protection and due process guarantees.²¹ However, the court apparently recognized the inadequacy of this reasoning. Taken to its logical conclusion, the court's reasoning would mean that even if police deliberately target ONLY blacks for interviews, courts can do nothing as long as the encounters are consensual. Thus, after announcing its holding, the court noted in the next breath that if facts in the record indicated that race played a role in the "consensual" encounter that led to the defendant's conviction, this would give rise to "due process and equal protection constitutional implications cognizable by th[e] court."²² Specifically, the defendant would have to show that:

[He] was selected for a consensual interview because he was an African-American, that the law enforcement officers at the Memphis Airport implemented a general practice or pattern that primarily target minorities for consensual interviews, or that they had incorporated a racial component into the drug courier profile²³

In a thorough and stinging dissent, Judge Keith, joined by three other judges, criticized the majority's failure to subject the consensual encounter to equal protection scrutiny, when the record showed that "[t]he only truly objective fact that could have given rise to the officers' [initial] suspicion was that Taylor was black." "The majority, by refusing to address the clear evidence of race-based conduct, has endorsed the frightening proposition that a defendant's subsequent, alleged consent legitimizes a governmental practice that violates the principles embodied in the equal protection clause."²⁴ Judge Keith pointed out, "the majority offers no citation of authority for the proposition that race discrimination in law enforcement is unreviewable or constitutional."²⁵ Indeed, as discussed above, there is abundant case law to the contrary.

In *United States v. Weaver*,²⁶ the Eighth Circuit rejected the defendant's claim that he was stopped without reasonable articulable suspicion of criminal activity,²⁷ where a DEA officer's decision to interview and then search the bags of the defendant was based partially on his observation that Weaver was a "roughly dressed" young black male.²⁸ The court held that the initial interaction between the DEA officer and the defendant was "consensual," and that the officer's subsequent decision to search the defendant's bags was supported by reasonable suspicion.

The defendant had been arrested at Kansas City International Airport after arriving on a flight from Los Angeles. The DEA officer testified that he had "intelligence information and also past arrest history on two black — all black street gangs from Los Angeles called the Crips and the Bloods. They are notorious for transporting cocaine into the Kansas City area from Los Angeles for sale. Most of them are 'young, roughly dressed black males.'"²⁹ Based on this, the court approved the officer's reliance, in conjunction with other factors,³⁰ on the fact that Weaver "was a roughly dressed young black male who might be a member of a Los Angeles street gang that had been bringing narcotics into the Kansas City area."³¹ However, just as the *Taylor* court had done, the court in *Weaver* court tempered its holding with an acknowledgment that there are at least some equal protection limits on "consensual" encounters. The court said,

We agree with the dissent that large groups of our citizens should not be regarded by law enforcement officers as presumptively criminal based upon their race. We would

not hesitate to hold that a solely race-based suspicion of drug courier status would not pass constitutional muster. Accordingly, had [the DEA agent] relied solely upon the fact of Weaver's race as a basis for his suspicions, we would have a different case before us.³²

In dissent, Chief Judge Arnold wrote,

I am not prepared to say that [race] could never be relevant. If, for example, we had evidence that young blacks in Los Angeles were more prone to drug offenses than young whites, the fact that a young person is black might be of some significance, though even then it would be dangerous to give it much weight. I do not know of any such evidence. Use of race as a factor simply reinforces the kind of stereotyping that lies behind drug-courier profiles. When public officials begin to regard large groups of citizens as presumptively criminal, this country is in a perilous situation indeed.³³

Brignoni-Ponce was a Fourth Amendment rather than an equal protection case,³⁴ arising in the context of a *Terry* stop rather than a "consensual" encounter. However, the Court's reasons for allowing the border patrol to consider Mexican ancestry at all is instructive:

Large numbers of native-born and naturalized citizens have the physical characteristics identified with Mexican ancestry, and even in the border area a relatively small proportion of them are aliens. [] The likelihood that any given person of Mexican ancestry is an alien is high enough to make Mexican appearance a relevant factor, but standing alone it does not justify stopping all Mexican-Americans to ask if they are aliens.³⁵

In this paragraph, *Brignoni-Ponce* provides, by implication, a basis for rejecting race as a factor in decision-making by officials charged with enforcing drug laws. Mexican aliens are, by definition, of Mexican descent. As the Court held, there is at least some logical correlation between Mexican appearance and alienage. Moreover, in the border area, there is also some actual correlation, however tenuous, between the two. Thus, it is reasonable for immi-

gration officials to rely in part on these correlations in their decisions about whom to stop. By contrast, there is absolutely no logical correlation between race and drug courier status. Nor is there proven an actual correlation. Thus, there is no reason, except invidious discrimination, for drug agents to rely on race in deciding whom to burden with consensual encounters.³⁶

In the arena of forfeitures, the recent case of *Jones v. United States Drug Enforcement Administration*, 819 F.Supp. 698, 1993 WL 127094, at *26 (M.D. Tenn. April 21, 1993) contains a helpful equal protection analysis of race-based airport police encounters. The court cites statistics on the racial composition of commercial air travelers and describes evidence of impermissible racial targeting by airport DEA agents. Although "deeply troubled" by other incidents (including a DEA airport encounter with the black producer of a *60 Minutes* segment about Mr. Jones' case) the court finds no evidence that Jones' encounter was racially motivated.

Litigation Strategy — A New Approach Suggested by *Batson v. Kentucky*

The hurdle that the defense must clear at a suppression hearing placed by *Taylor* and the other cases cited above presents a daunting challenge. To be able to demonstrate, as *Taylor* requires, that a DEA agent relied solely upon a defendant's race as the basis for initiating a consensual encounter is akin to proving thought crime. In the same way that pretextual traffic stops are difficult to attack, proving that race was the sole basis of an encounter will be a difficult task.

Approaches should include:

- Discovering the individual agent's prior police reports to demonstrate a pattern and practice of consensually encountering people of color and/or members of the underclass.
- The discovery of plane/train passenger manifests and the interview of other passengers to demonstrate the overall racial composition of the travelers and the disparate number of people of color who have been confronted by police.

• Discovery of any law enforcement profiles to flush out *de facto* racist elements and characteristics.

However, before marching ahead with the evidence as described above, the court should be presented with an alternative. The alternative is embodied in the analysis of race-based preemptory challenges in *Batson v. Kentucky*.³⁷ In *Batson*, the court

found that the equal protection clause forbids a prosecutor from challenging jurors on the assumption that black jurors are not impartial.³⁸ The court first recognized the societal harm caused when jurors were excluded based on race. "Selection procedures that purposely exclude black persons from juries undermine public confidence in the fairness of our system of justice."³⁹ To require proof by defense counsel of the repeated striking of black jurors was rejected as a "crippling" evidentiary burden. Instead, the court permitted defendant to make out a *prima facie* case showing that "the totality of the relevant facts gives rise to an inference of discriminatory purpose."⁴⁰ The burden then shifts to the state to show that permissible selection criteria and procedures were at play.

Although there is no case law support yet, encouraging a judge to adopt a *Batson* analysis of race-based consensual encounters is a critical first step. By permitting a *prima facie* case to shift the burden, a meaningful review of the reasons behind a consensual encounter is possible. Once the defense has shown that the defendant was approached for no other apparent reason than his race, the burden should shift to the government to articulate non-racial factors that precipitated the encounter. Without the burden shift, the defense faces a *Mission Impossible*.

The parallels between the exercise of peremptory challenges and the initiation of consensual encounters is clear. The same assumptions regarding people of color are at work in both situations. Race is equated with the likelihood of ongoing criminal activity in the minds of many police officers. The societal harm in discriminatory official action is equally devastating. A *Batson*-type analysis begins the process of accountability and visibility over a police officer's otherwise discretionary act.

As Justice Blackmun pointedly observed, "In order to get beyond racism, we must first take account of race. There is no other way."⁴¹

If criminal defense lawyers will not begin this candid, judicial examination of the influence of race on police behavior, who will? ■

Notes

1. *Florida v. Bostick*, ___ U.S. ___, 111 S. Ct. 2382, 2384, 115 L. Ed. 2d 389 (1991).

2. *Id.*

3. *Id.* at 2390.

4. *Id.*

5. The constitutional right to interstate travel is fundamental and well-established. *See, e.g.,* *United States v. Guest*, 383 U.S. 745, 757-59, 86 S. Ct. 1170, 16 L. Ed. 2d 239 (1966). Government action need not actually deter travel in order to trigger constitutional scrutiny. Rather, "[a]ny classification which serves to penalize the exercise of that right,

unless shown to be necessary to promote a *compelling* governmental interest, is unconstitutional." Dunn v. Blumstein, 405 U.S. 330, 339, 92 S. Ct. 995, 31 L. Ed. 2d 274 (1971) (citation omitted) (first emphasis added; second in original).

6. *Id.* at 2390 (emphasis in original).

7. *See id.* at 2390, n.1. *See also* U.S. v. Taylor, 956 F.2d 572, 581 n.1 (6th Cir.), *cert. denied*, ____ U.S. ____, 113 S. Ct. 404, 121 L. Ed. 2d 330 (1992) (officer admitted at evidentiary hearing that at least 75 percent of those followed and questioned in consensual police stops are black); Sheri Lyn Johnson, *Race and the Decision to Detain a Suspect*, 93 YALE L. J. 214, 234 (1983) ("Although the DEA has refused to commit the entire [drug courier] profile to writing, the profile clearly contains a racial component").

8. Today is not the first time in history that blacks have been subjected to this dual deprivation. In many parts of colonial America, blacks were required to carry "passes." Both before and after the Civil War, blacks were barred from entering certain states. *See* Tracey Maclin, *The Decline of the Right to Locomotion: The Fourth Amendment on the Streets*, 75 CORNELL L. REV. 1258, 1260 at n.4 (1990).

9. "The Trickle Down of Judicial Racism" from Judge Stephen Reinhardt's commencement speech at Golden Gate University in San Francisco, excerpted in HARPER'S MAGAZINE, August 1992, pages 15-17.

10. *See* Sheri Lyn Johnson, *Race and the Decision to Detain a Suspect*, 93 YALE L. J. 214, 225-237, and cases cited therein. Johnson notes that although race — by definition — cannot affect reasonable suspicion calculations unless it is statistically related to suspected criminal activity, the lower courts accept it as a factor without making any inquiry into whether there is, in fact, such a relationship.

11. 422 U.S. 873, 95 S. Ct. 2574, 45 L. Ed. 2d. 607 (1974).

12. For example, consider a detective's testimony at a suppression hearing in U.S. v. Lewis, 728 F.Supp. 784 (D.D.C.), *order reversed*, 921 F.2d 1294 (D.C. Cir. 1990). When asked by the court why he had chosen to approach the defendant, a young black male, during a bus sweep, the detective said, "There was nothing particular I saw in that man, no articulable thing that I saw that I just walked up to him and asked him if I could search him after identifying myself." *Id.* at 786.

13. Delaware v. Prouse, 440 U.S. 648, 661, 99 S. Ct. 1391, 59 L. Ed. 2d. 660 (1979).

14. Yick Wo v. Hopkins, 118 U.S. 356, 373-74, 6 S. Ct. 1064, 30 L. Ed. 220 (1866). *See also* Hall v. Pennsylvania State Police, 570 F.2d 86, 91 (3rd Cir. 1978) (police department may not instruct banks to target blacks in surveillance photographs, absent a proven and compelling state interest).

15. Batson v. Kentucky, 476 U.S. 79, 106 S. Ct. 1712, 90 L. Ed. 69 (1986).

16. Oyler v. Boles, 368 U.S. 448, 456, 82 S.Ct. 501, 7 L. Ed. 2d 446 (1961); *see also* Wayne v. United States, 470 U.S. 598, 105 S.Ct. 1524, 84 L. Ed. 2d. 547 (1985).

17. Wade v. U.S., ____ U.S. ____, 112 S. Ct. 1840, 118 L. Ed. 2d 524 (1992).

18. U.S. v. Williams, 963 F.2d 1337 (10th Cir. 1992).

19. 956 F.2d 572 (6th Cir.), *cert. denied*, ____ U.S. ____, 113 S. Ct. 404 (1992).

20. *Id.* at 574.

21. *Id.* at 578.

22. *Id.* at 579.

23. *Id.*

24. *Id.* at 582.

25. *Id.* at 583.

26. 966 F.2d 391 (8th Cir.), *cert. denied*, 113 S.Ct. 829, 121 L. Ed. 2d 699 (1992).

27. The court does not indicate whether the defendant actually raised the issue of equal protection.

28. *Id.* at 392.

29. *Id.* at 394, n.2.

30. The officer also relied on the facts that the defendant: arrived from a source city for drugs; moved rapidly through the airport toward a taxicab; had two carry-on bags and no checked luggage; carried no identification; had no copy of his ticket; appeared very nervous when he talked to the officer; did not mention that the purpose of his travel was to visit his mother until the end of the "consensual" interview. *Id.* at *7.

31. *Id.* at 394.

32. *Id.* at 394, n.2.

33. *Id.* at 397.

34. The Court did not mention the Equal Protection Clause once in the opinion.

35. *Id.* at 886-87.

36. The Court supported this analysis in a later case, United States v. Martinez Fuerte, 428 U.S. 543, 564, n. 17, 96 S. Ct. 3074, 49 L. Ed. 2d. 1116 (1975), noting that apparent Mexican ancestry might not be a legitimate basis for stopping people at a checkpoint near the Canadian border.

37. 476 U.S. 79 (1985).

38. *Id.* at 89.

39. *Id.* at 87.

40. *Id.* at 94.

41. Regis v. Bakke, 438 U.S. 265, 407, 98 S. Ct. 2733, 57 L. Ed. 2d. 750 (1978), Blackmun, J., (dissenting).

42. The Christopher Commission's investigation of the Los Angeles Police Department reported that one-fourth of police officers polled agreed that racial bias on the part of officers toward minority citizens currently exists and contributes to a negative interaction between police and the community.